

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

74-1912

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To be argued by
ALAN R. KAUFMAN

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 74-1912

UNITED STATES OF AMERICA,

Appellee,

—v.—

GEORGE FLORES,

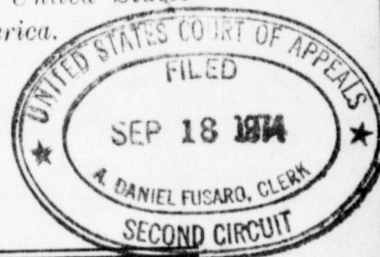
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

PAUL J. CURRAN,
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Southern District of New York,
Attorney for the United States
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UNITED STATES OF AMERICA,

Appellee,

—v.—

GEORGE FLORES,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

George Flores appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on June 21, 1974, after a three day trial before the Honorable Charles E. Stewart, Jr., United States District Judge, and a jury.

Indictment 73 Cr. 1140, filed December 21, 1973, charged Flores in Count One with unlawful possession of an unregistered firearm (Title 26, United States Code, Section 5861(d)); Count Two charged Flores with unlawful possession of an illegally made firearm (Title 26, United States Code, Sections 5861(e) and 5822); Count Three charged that Flores unlawfully transferred a firearm in violation of Title 26, United States Code, Sections 5861(e), 5811 and 5812.

Trial commenced on May 14, 1974 and ended on May 17, 1974, when the jury convicted Flores on Counts One and Two and were unable to reach a verdict on Count Three.

On June 21, 1974, Judge Stewart sentenced Flores to concurrent terms of two years imprisonment on Counts One and Two.

Flores is presently serving his sentence.

Statement of Facts

The Government's Case

On August 22, 1973, Special Agent Rafael Martinez of the Department of Treasury, Bureau of Alcohol, Tobacco, and Firearms, acting in an undercover capacity, met Flores in an apartment at 700 East 141st Street, Bronx, New York. Agent Martinez was accompanied by a confidential informant, Jesus Aponte. Flores told Agent Martinez that he was expecting a shipment of approximately 60 handguns and two machine guns the next day, which he offered to sell to Agent Martinez. At this meeting, Flores showed Agent Martinez two handguns which were not for sale, and a sawed-off shotgun which Flores offered to sell for \$125. Flores said that Agent Martinez could take delivery of the shipment of handguns and the sawed-off shotgun the following day (Tr. 14-18).*

On August 23, 1973, Agent Martinez and the confidential informant returned to the apartment. Flores gave the sawed-off shotgun and three rounds of ammunition to Agent Martinez, who paid Flores \$125. As Agent Martinez was leaving the apartment, Flores told him to stay in touch, because the shipment of handguns was expected shortly (Tr. 19-20; GXs 1 and 2).

* "Tr." refers to the trial transcript.

The weapon which Flores sold to Agent Martinez was an Ithaca M-66 super single 12 gauge shotgun. Its barrel length at the time that Flores sold it to Agent Martinez was 12 inches; its overall length was 21 inches. When originally manufactured, the shotgun's barrel length was 28 inches and its overall length was 54 inches (Tr. 24-25, 100-101, 115-116). This shotgun was not registered to Flores, nor was the required permission of the Secretary of the Treasury ever granted to cut down this shotgun (Tr. 143-144, 147-148; GX 3).

The Defendant's Case

The defendant's only witness was Jesus Aponte, the confidential informant. After testifying at length about how he became an informant, Aponte, with a few variations,* basically corroborated Agent Martinez's testimony (Tr. 187-201).

Government Rebuttal

Agent Martinez was recalled to the stand and testified that on August 22, 1973, before going to the first meeting with Flores, he met an individual named Ocasio, who showed Agent Martinez two handguns and a machine gun. Later that evening, when Agent Martinez met with Flores, Flores indicated that those firearms were his (Tr. 231-233).

* Aponte testified, in contradiction to Agent Martinez, that on August 22, 1973, Flores was unwilling to sell the shotgun to Agent Martinez. Aponte testified that the reason for this was that Flores had a "job to do" with the gun (Tr. 220).

ARGUMENT

The Government Fully Complied With the District Court's Plan for Achieving Prompt Disposition of Criminal Cases.

The sole issue raised in this appeal is whether Judge Stewart properly refused to dismiss the indictment on the grounds that the Government violated the District Court's Plan for Achieving Prompt Disposition of Criminal Cases ("the Plan") by not causing the case to be reassigned to a District Court Judge who could have tried the case within six months.

On August 27, 1973, a complaint was filed and a warrant for the arrest of George Flores was issued for a violation of the federal firearms laws. On October 15, 1973, Flores was arrested in Puerto Rico. Following a hearing he was ordered removed to the Southern District of New York, and on November 27, 1973, Flores was brought before Magistrate Goettel, who set bail at \$10,000 personal recognizance bond, secured by \$1,000. On December 21, 1973, Flores was indicted in three counts charging violations of the federal firearms law. On December 27, 1973, Flores was arraigned, and the case was assigned to Judge Stewart, with ten days given for motions.

On January 11, 1974, the Government served and filed a Notice of Readiness for trial on or after January 22, 1974.* The trial commenced on May 14, 1974.

During most of the interim between January 22, 1974 and May 14, 1974, Judge Stewart was the trial judge in *United States v. Riland*, 73 Cr. 311.** Due to the unanti-

* No suggestion is made that the Government was not in fact ready for trial as indicated in its Notice of Readiness.

** The *Riland* trial commenced on February 25, 1974 and ended on May 10, 1974. It was preceded by pretrial hearings and Judge Stewart's vacation.

cipated duration of the trial,* Judge Stewart, in early April, 1974, referred this case back to the Assignment Committee, and the case was reassigned to Judge Levet. A number of pre-trial conferences were scheduled in April; however, due to illness, Judge Levet cancelled those conferences, and in early May, the case was reassigned back to Judge Stewart.

The *Riland* trial ended on May 10, 1974, and Judge Stewart scheduled this trial to begin on May 13, 1974. On May 9, 1974, at a pre-trial conference, defense counsel, for the first time, complained of the delay in bringing this case to trial and moved for the dismissal of the indictment on the ground that the Government had not complied with Rule 4 of the Plan, requiring it to be ready for trial within six months. Judge Stewart denied the motion, ruling that the Government had complied with the Plan by filing its Notice of Readiness three months after Flores' arrest and two months after his return to this District. (P. Tr. 2-14; Appellant's App. A-3).**

This Court has held in a number of cases that the Government complies with Rule 4 of the Plan by filing its Notice of Readiness for trial within the applicable six-month period. *United States v. Flores*, Docket No. 74-1186 (2d Cir., August 7, 1974) slip op. at 5145-5152; *United States v. Atkins*, Docket No. 73-2802 (2d Cir., June 6, 1974) slip op. at 3987-3991; *United States v. Tirinkian*, 488 F.2d 873, 874-75 (2d Cir. 1973); *United States v. Cacciatore*, 487 F.2d 240 (2d Cir. 1973); *United States v. Picirro*, 478 F.2d 386 (2d Cir. 1973). In this case, the Government complied with Rule 4 of the Plan by filing its Notice of Readiness for trial approximately three months after Flores' arrest in Puerto Rico and approximately two months after his removal to this District.

* The *Riland* trial had been expected to last for about three weeks.

** "P. Tr." refers to the transcript of the pre-trial conference.

The delay in the trial of the case, after the Government had noticed its readiness for trial, is in no way attributable to the Government either as a matter of fact or a matter of law. The delay in the trial of this case was caused by the unexpected length of the *Riland* trial and by the fact that Judge Levet fell ill after this case was reassigned to him. Furthermore, under the provisions of the Plan, the Government's obligations are discharged by the filing of a timely Notice of Readiness, upon which the setting of a trial date is, under Rule 9(a) of the Plan, solely a matter for the District Court. *United States v. Atkins*, *supra* at 3990-91 makes this clear. There, *Atkins*' trial was scheduled almost ten months after his indictment due to the trial judge's congested calendar. This Court, citing Paragraph 9(a) of the Plan, held that "The Government was ready at all times after its March 12 Notice of Readiness which fully complied with the six months provision of the Plan." Footnote 2 of that opinion states:

"[*Atkins*'] motion claimed the government had violated the [Plan] by failing to bring [him] to trial within six months of the filing of the indictment. As we hold below, this claim is without merit because the government was ready at all times after its Notice of Readiness was filed on March 12."

See also, *United States v. Tirinkian*, 488 F.2d at 874-75.*

* The one case cited by appellant, *Hilbert v. Dooling*, 476 F.2d 355 (2d Cir. 1973) is totally inapposite factually, since it involves the Government's original failure to file its Notice of Readiness within six months of the defendant's arrest.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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of America.*

ALAN R. KAUFMAN,
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CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

PAUL J. CURRAN,
*United States Attorney for the
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AFFIDAVIT OF MAILING

State of New York)
County of New York)

ALAN R. KAUFMAN being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District of
New York.

That on the 18th day of September, 1974
he served 2 copys of the within Brief
by placing the same in a properly postpaid franked
envelope addressed:

DANIEL L. MEYERS, ESQ.
380 MADISON AVENUE
NEW YORK, N. Y.
10017

And deponent further says that he sealed the said en-
velope and placed the same in the mail drop for
mailing outside the United States Courthouse, Foley
Square, Borough of Manhattan, City of New York.

Alan R. Kaufman

Sworn to before me this

18th day of September, 1974

Gloria Calabrese

GLORIA CALABRESE
Notary Public, State of New York
No. 24-0535340
Qualified in Kings County
Commission Expires March 30, 1975